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equally liable for the second publication. The wrongful act of the creditor in first publishing has not changed the matter into one of public interest and, therefore, each publication would be a new invasion.

The courts have never decided what constitutes a sufficient publication to invade an individual's right of privacy. Warren and Brandeis* suggest that oral publications are so trivial that they should be protected in the interest of free speech. However, it is possible to imagine a situation in which an oral publication would be as serious as a written one. For example, under the same situation presented in the Trammel case if the creditor had addressed a public gathering or announced over a public address system to crowds in the street that plaintiff owed the bill and would not pay, the result would have been as harmful to plaintiff as it was in the present case. It is unlikely, however, that the courts would say that a publication to one person would tend to expose the plaintiff "to public contempt and ridicule or disgrace," but it is hard to determine just when a publication has been made to a sufficient number to invade the plaintiff's right. Probably the only rule that could be followed would be to allow recovery only when a publication of plaintiff's private matters is unreasonable under the circumstances. This rule would take into account all the circumstances of the case such as matter published, manner of publication, size of the community and the proportionate part of the community to which publication has been made.

MARY LOUISE BARTON

UNSATISFIED JUDGMENT AGAINST THE SERVANT AS A BAR TO SUIT AGAINST THE MASTER

Plaintiff was injured in a collision caused by the negligence of a truck driver employed by defendant. Execution raised on a judgment against the truck driver was followed by a return of "No property found." Plaintiff then sued defendant, seeking to hold it liable on the doctrine of respondeat superior. Defendant contended that plaintiff's prosecution to judgment of the suit against the servant barred suit against the master. *Held:* That an unsatisfied judgment against the servant would not bar suit against the master. Sherwood v. Huber & Huber Motor Express Company, 286 Ky. 775, 151 S.W. (2d) 1007 (1941).

The main issue in this case is whether an unsatisfied judgment against the servant will bar suit against the master. There are very

*Warren and Brandeis, *supra* note 5.

few decisions on this specific point;[1] the question arises for the first time in Kentucky in the principal case. Heretofore, Kentucky cases involving master and servant have dealt with the following situations: suits against the servant alone,[2] or against the master alone;[3] suits against master and servant jointly, in which the question of joinder necessarily arises and is disposed of by *treating* master and servant as joint tortfeasors;[4] and finally, successive suits against master or servant, the first resulting in a judgment *for* the defendant, in which situation the question of *res judicata* may be involved.[5]

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[1] Brennan v. Huber, 112 Pa. Sup. 299, 171 Atl. 122 (1934) (unsatisfied judgment against servant held no bar to suit against master. However, the master's misrepresentation to plaintiff as to the fact of the master-servant relationship strongly influenced the decision); Huey v. Dykes, 203 Ala. 231, 82 So. 481 (1919) (master and servant considered joint tortfeasors, only satisfaction from one will bar suit against the other); Maple v. R. Co., 40 Ohio St. 313 (1883) (judgment against agent for tort of fraud held no bar to suit against the principal); *cf.* Raymond v. Capobianco, 107 Vt. 295, 178 Atl. 896, 98 A.L.R. 1051 (1935) (unsatisfied judgment against servant held bar to suit against master. This decision was criticised in 45 Yale L. J. 920).

[2] Pool v. Adkisson, et al., 31 Ky. 110 (1 Dana 1883). See also 1 *Mechem on Agency* (2d ed. 1914), 1075, "... the fact that the wrongdoer purported to do the act as agent for another is entirely immaterial as far as his own liability is concerned."

[3] Bray-Robinson Clothing Co. v. Higgins, 210 Ky. 432, 276 S.W. 129 (1925) (master held liable on doctrine of respondeat superior). See also 2 *Mechem on Agency* (2d ed. 1914), sec. 1874.

[4] Illinois C. R. Co. v. Coley, 121 Ky. 385, 89 S.W. 234, 1 L.R.A. (N.S) 370 (1905); New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 93 S.W. 598, 9 L.R.A. (N.S.) 475 (1906). In Illinois C. R. Co. v. Coley, *supra*, the court applied the maximum "qui facit per alium facit per se", and decided that master and servant were both *wrongdoers*, and might be sued jointly. New Ellerslie Fishing Club v. Stewart apparently followed this decision. But see Illinois C. R. Co. v. Appelgate's Admrx., 268 Ky. 458, 105 S.W. (2d) 153 (1936) (although the question of joinder of master and servant was not involved in this case, the court said that the old rule in Kentucky, holding that judgment in favor of the servant would not preclude judgment against the master, was based on the theory that master and servant were *joint tortfeasors which theory was erroneous*. In the principal case, Sherwood v. Huber & Huber Motor Express Co., at 780, the court expressed the opinion that it did not see why plaintiff might not *treat* master and servant as joint tortfeasors, for the purpose of suing them successively until satisfaction was obtained.

The term "joint tortfeasors" means two or more persons whose concerted or concurrent acts have combined to produce an injury, or two or more persons, the acts of one of whom is planned, assisted or encouraged by others. Prosser on Torts (1941) 1092. It is clear that the master who is liable derivatively did not act, nor did he plan, assist or encourage his servant's act, and is therefore not a joint tortfeasor with his servant.

[5] Myers' Admrx. v. Brown, 250 Ky. 64, 61 S.W. (2d) 1052 (1933) (judgment *in favor of* master, after the servant's negligence had been put into issue, held not *res judicata* as to servant). This case was criticised in 26 Ky. L. J. 374. *But see* Blue Valley Creamery Co. v. Cronimus, 270 Ky. 496, 110 S.W. (2d) 286 (1937) (meritorious judgment in favor of the servant held bar to suit against the master).

The principal case, however, presents an entirely different problem. The questions of joint tortfeasors, joinder of master and servant, and *res judicata*, are not involved. The issue is simply whether the plaintiff, who has an outstanding, unsatisfied judgment against the servant, will be barred from suing the master whom he knew to be the master when judgment against the servant was taken. It would seem that only on some theory of election would the plaintiff be barred. However, the *"election"* required in contract cases involving agent and undisclosed principal, where to hold both liable would be to disregard, and at the same time recognize, the agency relationship, is properly held not to be applicable.[6] Nor does the doctrine of election of remedies apply where suits are against different persons and are consistent,[7] as in the principal case. Here are two separate and independent liabilities. The servant is liable because his negligence has injured the plaintiff, and the master is liable because the law has made him so for the injury caused by the servant's negligent act committed within the scope of his employment. Moreover, the fact that master and servant may be joined in one action[8] is further evidence that the remedies are considered consistent.[9] Consequently, no reason is apparent why the plaintiff may not proceed successively against servant and master until satisfaction is obtained.

R. POLLARD WHITE

MISLAID PROPERTY—MONEY IN TRAVELING BAG

Plaintiff's intestate spent the last years of his life in a veteran's hospital and during his confinement therein, he owned and kept in his room a traveling bag. Shortly before his death he withdrew all of his money in gold certificates from a bank. Following intestate's death the bag was sold and delivered by plaintiff to appellant whose wife subsequently discovered between the lining and bottom thereof a large sum of money in gold certificates. Part of the money was placed in a bank and the rest was converted. The evidence is clear that at the time of finding appellant knew to whom the money had previously belonged. Plaintiff, as intestate's administrator, sought an injunction restraining the bank from paying over to appellant the money held by it and asked for a personal judgment against appellant for the amount converted. *Held:* The injunction granted and appellant liable for money had and received. *Baugh* v. *Williams' Admr.*, 264 Ky. 167, 94 S.W. (2d) 330 (1936).

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[6] Mechem, Outline of Agency (3d ed. 1923) 382. Note (1939) 45 Yale L. J. 920, 923.

[7] Herd v. Wade, 63 S.W. (2d) 253 (Tex. Civ. App. 1933). Generally, the doctrine of election of remedies involves a "choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to the other." 20 C.J. 2.

[8] The majority of jurisdictions, including Kentucky, allow joinder of master and servant. See Notes: (1935) 98 A.L.R. 1059.

[9] *Note* (1939) 5 Ohio St. L. J. 243, 245.